A

MOSES BARTHOLOMEW

v.

SIVANESAN ACHALINGAM & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
HAMID SULTAN ABU BACKER J
[SUIT NO: S4-23-97-2008]
23 NOVEMBER 2012

C ***CIVIL PROCEDURE:*** *Striking out - Application for - Plaintiff seeking damages for alleged libel - Whether frivolous - Whether impugned article or statements directed against plaintiff - Whether words complained of were defamatory of plaintiff - Whether an abuse of court process - Whether there was justification to strike out plaintiff's case - Jameel v.* D *Dow Jones & Co Inc*

TORT: *Defamation - Damages - Exorbitant and unprecedented quantum - Whether justified - Whether publication lacked elements of tort - Whether words complained of were defamatory of plaintiff - Whether an abuse of* E *court process - Striking out claim - Whether justified*

The plaintiff filed a case in the High Court seeking quantum in damages against the defendants for libel based on alleged defamatory statements made by the first defendant at a press conference which were subsequently published by the second and F third defendants. The defendants applied for the court to strike out the plaintiff's claim under O. 18 r. 19(1) of the Rules of Court 2012 and submitted, *inter alia,* that (i) the plaintiff had not pleaded that the impugned article or statements were actually uttered by the first defendant; (ii) the alleged defamatory statements uttered G by the first defendant neither referred to nor were directed against the plaintiff, and did not identify the plaintiff; and (iii) the facts justified the action to be dismissed as advocated in the case of *Jameel v. Dow Jones & Co Inc ('Jameel').*

H **Held (allowing defendants' application with no order as to costs):**

[1] The plaintiff filed the case herein seeking an exorbitant and unprecedented quantum in damages on a publication lacking I elements of tort which must, *prima facie,* be seen to be an abuse of process of the court and ought to be dismissed *in*

limine. Further, the basic facts were not in dispute and in consequence, it was not difficult to come to a conclusion that one or more of the essential elements of tort was lacking, and the relevant statutory defence would clearly assist the defendants to negate liability. By no stretch of one's imagination could any reasonable man say in considering the natural and ordinary meaning complained of, that the words complained of were defamatory of the plaintiff. (para 8)

[2] There was much merit in the defendant's complaint that if the matter were to proceed, there were a number of witnesses who need to be called and it would take several days for the completion of a sterile case *ab initio*. Hence, there was justification to employ the jurisprudence in *Jameel*'s case to strike out the plaintiff's case for abuse of process of the court. However, there was no order as to costs as the defendants were not vigilant in filing their respective applications at the earliest opportunity. (para 8)

Case(s) referred to:

Ayob Saud v. T S Sambanthamurthi [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321 HC ***(refd)***

Charles Forte Investments Ltd v. Amanda [1963] 1 Ch 240 ***(foll)***

Chew Sew Khian @ Chew Hua Seng v. Saniboey Mohd Ismail & 3 Ors [2002] 1 LNS 333 HC ***(refd)***

Davy v. Garrett [1877] Ch D 473 ***(foll)***

Foo Yong v. Pang Ee Seng & Anor [2012] 1 LNS 1050 HC ***(refd)***

Halim Arsyat v. Sistem Televisyen Malaysia Bhd & Ors [2001] 7 CLJ 268 HC ***(refd)***

Jameel v. Dow Jones & Co Inc [2005] EWCA Civ 75 ***(foll)***

Sulaihah Maimunni v. UEM Builders Berhad & Anor [2012] 1 LNS 1055 HC ***(refd)***

Tan Seng Hin v. Editor of "See Hua Daily News" & Anor [2009] 7 CLJ 265 HC ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 18 rr. 19 (1)(b), (c), (d)

For the plaintiff - Sheelan Arjunan; M/s Sheelan Arjunan & Co

For the 1st defendant - Sivanesan Achalingam (Ponnusamy Kalaichelvan with him); M/s A Sivanesan & Co

For the 2nd defendant - Low Chooi Ping; M/s Low & KH Boo

For the 3rd defendant - Arumugam Suvalingam; M/s Aru & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Hamid Sultan Abu Backer J:

[1] This is my judgment in respect of the defendants' applications, encl. 36 (first defendant), encl. 37 (third defendant), encl. 38 (second defendant) in principle, inviting the court to strike out the plaintiff's claim under O. 18 r. 19(1)(b), (c) and (d) of the Rules of Court 2012 and inherent jurisdiction of the court substantially anchoring the arguments based on the English Court of Appeal's decision in *Jameel v. Dow Jones & Co Inc* [2005] EWCA Civ 75 which I have dealt with in two cases namely *Sulaihah Maimunni v. UEM Builders Berhad & Anor* [2012] 1 LNS 1055, decision delivered on 31 October 2012) and *Foo Yong v. Pang Ee Seng & Anor* [2012] 1 LNS 1050, decision delivered on 30 October 2012) where I have dealt with the jurisprudence in detail. I do not wish to repeat the jurisprudence in detail in this case save to say that the two cases must be read with this judgment for purpose of comprehensiveness only.

[2] I must say this case though filed in the year 2008, came before me for the first time for case management on 1 October 2012. After having perused the file and discussed with the parties, I realised that, *inter alia*, the plaintiff has chosen to quantify the damages against each defendant in the tune of RM10 million in respect of not only one head of damages but several heads of damages and very interestingly in a case where none of the publications directly and/or indirectly refer to the plaintiff. The endorsement in the writ as to quantum *prima facie* on the basic facts of the case will show that the suit has been filed with ulterior motive as opposed to seeking solace under a vindication process. The said endorsement to the writ reads as follows:

Pengindorsan Tuntutan

Plaintif menuntut terhadap defendan-defendan seperti berikut:

(a) Satu perintah injunksi bagi menghalang defendan pertama, defendan kedua dan defendan ketiga dan setiap seorang daripada mereka sama ada secara sendiri, agen-agen atau pekerja-pekerja mereka atau sebaliknya dari menerbitkan atau menyebabkan atau membenarkan penerbitan lanjut kata-kata fitnah atau kata-kata serupa yang memfitnahkan plaintif.

(b) Defendan pertama untuk membayar ganti rugi pampasan sebanyak RM10,000,000 untuk libel di bawah perenggan 12 di atas;

(c) Defendan pertama untuk membayar ganti rugi pampasan sebanyak RM10,000,000 untuk libel di bawah perenggan 13 di atas;

(d) Defendan pertama untuk membayar ganti rugi pampasan sebanyak RM10,000,000 untuk libel di bawah perenggan 15 di atas;

(e) Defendan kedua untuk membayar ganti rugi pampasan sebanyak RM10,000,000 untuk libel di bawah perenggan 11 di atas;

(f) Defendan kedua untuk membayar ganti rugi pampasan sebanyak RM10,000,000 untuk libel di bawah perenggan 12 di atas;

(g) Defendan kedua untuk membayar ganti rugi pampasan sebanyak RM10,000,000 untuk libel di bawah perenggan 13 di atas;

(h) Defendan ketiga untuk membayar ganti rugi pampasan sebanyak RM10,000,000 untuk libel di bawah perenggan 15 di atas;

(i) Defendan pertama untuk membayar ganti rugi termasuk ganti rugi teruk dan/atau teladan kerana libel di bawah perenggan 12 di atas;

(j) Defendan pertama untuk membayar ganti rugi termasuk ganti rugi teruk dan/atau teladan kerana libel di bawah perenggan 13 di atas;

(k) Defendan pertama untuk membayar ganti rugi termasuk ganti rugi teruk dan/atau teladan kerana libel di bawah perenggan 15 di atas;

(l) Defendan kedua untuk membayar ganti rugi termasuk ganti rugi teruk dan/atau teladan kerana libel di bawah perenggan 11 di atas;

(m) Defendan kedua untuk membayar ganti rugi termasuk ganti rugi teruk dan/atau teladan kerana libel di bawah perenggan 13 di atas;

(n) Defendan ketiga untuk membayar ganti rugi termasuk ganti rugi teruk dan/atau teladan kerana libel di bawah perenggan 15 di atas;

(o) Faedah pada kadar lapan peratus (%) setahun ke atas ganti rugi yang diawadkan dalam perenggan 24(b) hingga 24(n) di atas dari tarikh penghakiman sehingga ke tarikh penyelesaian sepenuhnya;

(p) Kos tindakan ini dibayar oleh defendan-defendan kepada plaintif berdasarkan indemniti penuh peguamcara/klien; dan

(q) Relief lain atau relief lanjut yang difikirkan patut dan sesuai oleh Mahkamah Yang Mulia ini.

[3] It is trite that the procedural jurisprudence under the Rules of Court 2012 requires the court to take an inquisitorial approach to arrest abuse of process of court *in limine* and where the jurisprudence relating to *Jameel*'s case applies. In *Foo Yong (supra)* I have made the following observations:

> [5] It is important to note that after the Rules of Court 2012 coming into force, the court is duty bound to dispose of the matter justly, expeditiously and economically, and in this process, unmeritorious litigation which has no reasonable prospect of success and/or will not yield proportionate result in relief, costs, and judicial time taking into consideration the tax payers' purse, need to be weeded out at *limine*, and where appropriate, such action must be struck out as an abuse of process of court. Such an approach was advocated in the case of *Jameel v. Dow Jones & Co Inc* [2005] EWCA Civ 75 where the Court of Appeal in a defamation suit where publication was limited to only a handful of persons, was struck out for abuse of process of court notwithstanding the plaintiff, *prima facie*, had a cause of action to ventilate. The Court of Appeal ruled:
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> (2) The action would be dismissed as an abuse of process if the claimant succeeded in his action and was awarded a small amount of damages, it could perhaps be said that he would have achieved vindication for the damage done to his reputation in England, but both the damage and the vindication would be minimal. The cost of the exercise would have been out of all proportion to what had been achieved. If the court were considering an application to set aside permission to serve the

proceedings out of the jurisdiction, it would allow that application on the basis that the five publications that had taken place in the jurisdiction did not, individually or collectively, amount to a real and substantial tort. Jurisdiction was no longer in issue, but, for precisely the same reason, it would not be right to permit the action to proceed. It would be an abuse of process to continue to commit the resources of the English court, including substantial judge and possibly jury time, to an action where so little was now seen to be at stake. Moreover, if the litigation were to proceed and to culminate in judgment for the claimant, it was unlikely that the court would be able, or prepared, to formulate and impose an injunction against repetition of the defamation in terms that would be of value to the claimant.

[6] The jurisprudence expressed by the Court of Appeal was recently echoed by the Chief Justice YAA Tun Arifin Zakaria on 28 September 2012 at the closing ceremony of the International Malaysia Law Conference (IMLC) 2012. The learned Chief Justice had this to say:

9. We subscribe to the commonly held view by many jurisdictions throughout the world as aptly stated in *Jameel v. Dow Jones* and Co [2005] EWCA Civ 75 where the court said:

It is no longer the role of the court simply to provide a level playing field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice.

10. Thus, judicial resources ought not to be unnecessarily wasted on trivial issues that have little or no bearing on the justice of the case. The court process should not be allowed to be exploited or abused so as to frustrate the course of justice. In the final analysis, justice must prevail.

11. Evan Bell, Master of the Queen's Bench and Matrimonial Divisions, Court of Judicature of Northern Ireland, in his article entitled "Reflecting on the Judicial Role: How Valid is the Analogy that 'Judges are Like Umpires?" observed that:

> In civil proceedings a judge is not simply 'a silent umpire'. Fairness of proceedings required the judge to be actively involved in the management of the trial, to

control the proceedings, to ensure that public and private resources are not wasted, to point out when evidence is irrelevant, and to refuse to listen to irrelevant evidence. A *supine* approach towards litigation by judges was not justifiable either in terms of the fair trial requirement or in the context of resources.

[7] The practice of the apex jurisprudence here always has been to give the litigant a day in court where an applicant cannot satisfy the threshold requirement to strike out a matter or enter summary judgment. In view of the tacit acceptance of the Chief Justice of the decision of the English Court of Appeal and the present jurisprudence pursuant to the Rules of Court 2012 to justly, economically and expeditiously deal with the action, it can now be said that a plaintiff or defendant or for that matter an applicant filing a suit or defence or application as the case may be by paying RM200 filing fees or so, cannot abuse the process of court when there is no reasonable prospect of success or it will not yield proportionate result in relief and costs etc, to the parties as well as tax payers.

[8] In addition, I must say the jurisprudence advocated in *Jameel*'s case has been constantly used in the UK to strike out matters for abuse of process of court not only in defamation suit but also in other suits and variety of instances (see *Steinberg v. Englefield and another* [2005] EWCA Civ 824). It is timely for our apex court to incorporate the jurisprudence advocated in *Jameel*'s case by case laws even for areas such as striking out as well as summary judgment and provide the right test as opposed to the low threshold which permits a litigant to have a day in court even though there is no reasonable prospect of success in respect of liability and if only it is an issue of quantum it can always be a subject matter of assessment. The Chief Justice's statement has jurisprudential significance taking into consideration the Rules of Court 2012 for just, expeditious and economical disposal of case. In fact, after *Jameel*'s case, there are more than 150 cases in the UK which have employed the robust approach advocated in *Jameel*'s case.

...

[15] After having given much consideration to the submission of the learned counsel for the plaintiff, I take the view that the said order is too wide, vague and imprecise to *prima facie* succeed by way of committal proceedings. In my view, the

present committal proceedings is an abuse of process of court and ought to be struck out *in limine*. In addition, I must say it is trite that the court has inherent jurisdiction to *suo moto* intervene and strike out a matter *in limine*. The jurisprudence was well articulated as early as 1877 in the case of *Davy v. Garrett* (1877) Ch D 473 where a statement of claim in the opinion of the Court of Appeal was calculated to embarrass the defendant by reasons of stating immaterial facts etc., and was ordered to be struck out even though a motion for that purpose had been dismissed by the court below. In *Charles Forte Investments Ltd v. Amanda* [1963] 1 Ch 240 Danckwerts LJ stated:

> In my view, the petition, if allowed to proceed, must fail and the presentation of the petition would be an abuse of the process of the court and should be prevented under the inherent jurisdiction which the court possesses.

[16] Now, the robust approach extended by *Jameel*'s case is relevant to this case. In the instant case, the plaintiff's application for committal creeps in after the trial based on a vague order. If the committal proceedings were to proceed again (to give another bite at the proverbial cherry), it will take much judicial time as a full trial on quasi-criminal basis has to be conducted. To arrest the futile proceedings at *limine*, court has to be vigilant and apply the jurisprudence in *Jameel*'s case as advocated by the Chief Justice.

[4] In *Sulaihah (supra)* I have made the following observations:

[8] …

(f) In addition, I must say taking into consideration that the nett effect of damages being nominal only in this case the fact the plaintiff and second defendant had deemed it fit to proceed in the High Court is by itself an abuse of process of court and ought to be struck out *in limine*. Support for the proposition is found in a number of cases. In *Sullivan v. Bristol Film Studios Ltd* [2012] EWCA Civ 570 the court took the view that it was abuse of process of court on the grounds that the plaintiff ought to have filed the action in the lower court. Though the english procedural rules are not *pari materia* or equipollent to the Rules of Court 2012, it is clear from the Courts of Judicature Act 1964, the Subordinate Courts Act 1948, the subordinate court and High Court are vested with specific jurisdiction even though all subordinate court matters in the pretext of seeking a

specific relief claim under the Specific Relief Act 1950 such as declaration and/or injunction or that the quantum will be more than RM250,000 etc, to file in the High Court and thereby abuse the process of the court (see *Alliance Bank Malaysia Bhd v. W Shalihudin W Ibrahim* and another suit [2012] 10 MLJ 374). I am afraid such tactics under the emerging jurisprudence of *Jameel*'s case ought to be arrested at *limine* and the Rules of Court 2012 has mandated the court to take an inquisitorial approach for any matters filed in court for just, expeditious and economical disposal of the case. Where the jurisdiction is abused, the proper order ought to be struck out or for the matter be transferred to the subordinate court. In any event, if the matter is struck out, that does not necessarily mean it cannot be refilled in the appropriate court provided limitation has not set in.

(g) *En passant*, I must say litigants who file suits in the High Court where adequate relief can be obtained in the subordinate courts or where the suit itself is an abuse of process of court as advocated in *Jameel*'s case, the court has a duty and obligation to strike out the matter *in limine*. Many cases which have been filed may be caught by *Jameel*'s jurisprudence. For example, in contract, where breach only will result in nominal damages or in tort such as trespass where damages may only be nominal or simply seeking declaratory relief for breach of contract where relief is founded on the Contracts Act 1950 etc. It is yet to be seen to what extent apex court will endorse *Jameel*'s jurisprudence, as to "walk the talk" advocated by judges and jurist in various jurisdiction is no easy matter to comprehend with when archaic case laws which are not within the spirit and intent of the Rules of Court 2012, are staring at the court of justice inviting the adjudicator to give a day in court to unmeritorious litigant without taking into consideration every aspect including public purse (see *Shahidan Shafie v. Atlan Holdings Bhd & Anor* [2012] 6 AMR 76).

Brief Facts

[5] The first defendant, YB Sivanesan Achalingam has summarised the facts succinctly and it reads as follows:

It is an agreed fact that a motorbike accident took place between the plaintiff and Mohan (deceased). Pursuant to the motorbike accident the plaintiff sent a person to negotiate a settlement with

the involved parties. The deceased's father alleged that the plaintiff demanded RM4,000 as compensation. Further the deceased's father complained to the first defendant who is a lawyer and politician who issued a press statement stating that the suspect mentioned should be arrested. However, the suspect's name and/or his identity was never referred to or mentioned. The publication on 9 January 2008 did not make any reference to the identity or referred to the photograph of the plaintiff. But the second defendant did mention that the alleged person was the Ketua MIC Cawangan Sri Pandan Jaya Baru. All litigating parties agreed that the Pandan Parliamentary Constituency has many MIC branches. It was not able to decipher specifically the particular persons referred to in the said impugned article and it is not clear from the said article if the first defendant made those statements against the plaintiff.

What is clear is that the alleged statement was made by the deceased's father and not by the first defendant. It would have been proper if the plaintiff has initiated an action against the maker of the alleged statement and not against the first defendant.

And says, *inter alia*, (i) the pleadings should be struck out as it is obviously unsustainable and has no chance of success; (ii) pleadings disclose no reasonable cause of action; (iii) the plaintiff had not pleaded that the impugned article or statements were actually uttered by the first defendant; (iv) the alleged defamatory statements uttered by the first defendant neither referred to nor were directed against the plaintiff; (v) the facts justify the action to be dismissed as advocated in *Jameel*'s case.

The Second Defendant

[6] It is the contention of learned counsel for the second defendant that the said impugned articles did not identify the plaintiff. I find much merit in the argument, after going through the Tamil version of the article repeatedly and also the Bahasa Malaysia translation taking into consideration the fact that the plaintiff in paras. 2(a) and (b) has identified himself as:

(a) Pengerusi Malaysian Indian Community (MIC) Cawangan Kampung Pandan Jaya Baru, Selangor hampir selama 14 tahun;

(b) Bekas Naib Pengerusi MIC Division Pandan;

...

A The above description is not found in the impugned article.

The Third Defendant

[7] The contention of learned counsel for the third defendant is on similar line with that of the second defendant and has merits B on the facts of the case.

[8] I have read the applications, the affidavits and submission of the parties in detail. The parties have placed a comprehensive submission on the law and facts. The court is grateful. It will serve C no useful purpose to repeat the same save to deal with the core issues. After having given much consideration to the submission of learned counsel for the plaintiff, I take the view that it is a fit and proper case to strike out the plaintiff's claim. My reasons, *inter alia*, are as follows:

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(a) In the instant case, the plaintiff has chosen to file the case in the High Court seeking exorbitant as well as unprecedented quantum in damages on a publication lacking elements of tort which must *prima facie* be seen to be an abuse of process of E court and ought to be dismissed *in limine* even based on the conservative jurisprudence as advocated in cases like *Davy v. Garrett* [1877] Ch D 473 and *Charles Forte Investments Ltd v. Amanda* [1963] 1 Ch 240.

F (b) In the instant case, the basic facts are not in dispute and in consequence, it is not difficult to come to a conclusion that one or more of the essential elements of tort is lacking, and the relevant statutory defence will clearly assist the defendants to negate liability (see *Ayob Saud v. T S Sambanthamurthi* [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321; *Chew Sew Khian @ Chew Hua Seng v. Saniboey Mohd Ismail & Ors* [2002] 1 G LNS 333; [2003] 5 MLJ 91; *Halim Arsyat v. Sistem Televisyen Malaysia Bhd & Ors* [2001] 7 CLJ 268; [2001] 6 MLJ 353).

(c) By no stretch of one's imagination could any reasonable man H say in considering the natural and ordinary meaning complained of, that the words complained of were defamatory of the plaintiff. The test is objective and not subjective. In *Tan Seng Hin v. Editor of "See Hua Daily News" & Anor* [2009] 7 CLJ 265, relating to the defence for newspapers, I I made the following observations:

(3) The defendants were news publisher. Their rights, privileges, immunities are quite different from any commercial organizations or private persons. Newspapers are ordinarily expected to report contemporary events of public interest or of public concern which is often liberally construed by the courts. In his context, news is defined by the *Concise Oxford Dictionary* as information about important or interesting recent events. The truth *per se* is not material but the fact that such things were said in appropriate occasions by the maker may give the news media the right to publish the same. In this case, the defendants said it was true in substance and/or the defence of qualified privilege would apply (ss. 8 and 12 of Defamation Act 1957). (para. 11)

(d) There is much merit in the defendant's complaint that if the matter were to proceed, there are a number of witnesses who need to be called and will take several days for the completion of a sterile case *ab initio*. Hence, there is justification to employ the jurisprudence advocated in *Jameel*'s case to strike out the plaintiff's case for abuse of process of court, and also the case of *Sullivan* to say even if the plaintiff had a cause of action, the suit ought to have been filed in the subordinate court.

[9] For reasons stated above, the relevant defendants' application in encls. 36, 37 and 38, is allowed and the plaintiff's suit is struck out. On the issue of costs, I take the view that no order as to costs ought to be made as the defendants were not vigilant in filing the applications at the earliest opportunity.

I hereby order so.